Evangeline of Natchitoches, Inc. *and* Local 100, Service Employees International Union, AFL–CIO. Cases 15–CA–12549 and 15–CA–12581

February 27, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

Pursuant to a charge filed on April 6, 1994, in Case 15–CA–12549, and amended charges filed on April 28, 1994, and on May 8, 1995, the Acting Regional Director for Region 15 of the National Labor Relations Board issued a complaint on April 29, 1994, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 15–RC–7807. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses. Pursuant to a charge filed on April 28, 1994, in Case 15–CA–12581, the Acting Regional Director issued a complaint on December 21, 1994, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to furnish the Union with requested information. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses. The Acting Regional Director issued a consolidated complaint on May 22, 1995. The Respondent filed an answer (followed by an amended answer) admitting in part and denying in part the allegations in the consolidated complaint and asserting affirmative defenses. As to the information, the Respondent admitted that the Union had requested it, but denied that the information was necessary or relevant because the certification of the Union was legally incorrect. The Respondent admitted not furnishing the information, again citing its belief that the unit should not have been certified because all of its members were statutory supervisors.

On November 24, 1995, the General Counsel filed a Motion for Summary Judgment. On November 29, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On March 5, 1996, the Respondent filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent asserts, as defenses to its refusal to bargain, that the certification of the unit is contrary to law because it contains supervisory personnel, and that the Respondent is under no duty to bargain with the Union because the unit sought is inappropriate for purposes of collective bargaining. In its opposition, the Respondent argues that the Board improperly included in the unit licensed practical nurses (LPNs) who responsibly direct the work of nurses aides in the unit and are supervisors within the meaning of Section 2(11) of the Act under the standard enunciated in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994). Indeed, the Respondent contends that in the underlying representation proceeding, the Regional Director certified a wholly supervisory unit composed of LPNs.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[1] The Respondent does not offer to adduce any newly discovered or previously unavailable evidence. However, we find that *NLRB v. Health Care & Retirement Corp.*, which issued after the underlying representation proceeding in this case, constitutes a special circumstance requiring the Board to reexamine its decision in the representation proceeding.[2]

In *Health Care & Retirement Corp.*, the Supreme Court rejected the Board's view that charge nurses were not supervisors within the meaning of Section 2(11) of the Act if their instructions to other employees were merely in furtherance of patient care. It found the Board's use of its "patient care" analysis in construing the phrase "in the interest of the employer" in Section 2(11) was "inconsistent with both the statutory language and this Court's precedents." (Id. at 1783.) The Regional Director's Decision and Direction of Election, which the Board essentially adopted, used the now-discredited "patient-care" analysis in its discussion of the supervisory indicia of assignment and direction of other employees' work. Accordingly, we do not rely on that analysis and have independently reexamined the record in light of the Supreme Court's later decision in *Health Care & Retirement Corp.*, supra, and our recent decisions in *Providence Hospital*, 320 NLRB 717 (1996); and *Ten Broeck Commons*, 320 NLRB 806 (1996).

Our review of the record persuades us that the LPNs' assignment of work and direction of employees in this case is routine and does not require independent

[1] *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941).

[2] The Respondent raised the issue of the authority of LPNs to use independent judgment in replacing absent nurses aides and/or awarding extra work hours or overtime in its request for review of the Regional Director's Decision and Direction of Election in Case 15–RC–7807. The Board denied the request for review on February 17, 1994.

judgment. The nurses aides need little direction because their tasks are routine and they are familiar with their patients. The director of nursing (DON) creates the monthly work schedule for the aides, which the LPNs have no authority to change. The DON also divides patients into groups, called "books," so as to divide evenly the patient workload. The record indicates that the DON assigns each full-time aide to a particular book. LPNs cannot institute permanent changes in patient assignments. LPNs assign part-time aides to cover the book of absent full-time aides, but all aides are apparently equally qualified to cover any book. A printed nursing assistant schedule sets forth specific daily duties of the aides (for example, "pass water and ice"; "pick up water pitchers"; and "clean bedpan room and whirlpool seat") and the times when these tasks are to be performed. Each day, the LPN fills in the blank next to each task with the name of the aide who will perform the task. Because all aides are equally qualified to perform the listed tasks, LPNs rotate the tasks among the aides, so that over a period of time all aides perform all tasks. The Regional Director found, and we agree, that these LPN functions are routine and therefore not indicative of supervisory status. LPNs sometimes assign aides to tasks that are not on the assignment sheet (for example, taking a patient to the bathroom or to the doctor, cleaning a patient, or giving a patient an enema). Also, in monitoring patient care, LPNs may instruct aides to perform tasks differently. However, these instances involve routine or technical aspects of patient care and do not, in our view, show that the LPNs possess supervisory authority. See *Ten Broeck Commons*, supra at 811.

Similarly, although LPNs (like ward clerks and nurses aides) find replacement aides when those scheduled to work indicate that they will be absent, they follow a standard procedure within guidelines established by the Respondent. Further, LPNs have no authority to order or require an aide to appear as a replacement.[3] To the extent that LPNs send home aides who are incapacitated because of alcohol, drug use, or illness, the Regional Director found, and we agree, that little discretion is involved because LPNs are required to take such action. Further, the need for such action would be obvious.

Although LPNs issue oral and written warnings, there is no evidence that such warnings necessarily result in adverse action. Further, if there is a factual dispute between an LPN and an aide as to the events surrounding such a warning, the DON independently investigates the matter. Although an LPN may note that another infraction may result in a specific disciplinary action, we agree with the Regional Director's finding that there is no evidence that such a notation amounts to effective recommendation of such action. The warnings are merely reportorial and do not indicate supervisory status.

Although LPNs are rated, in their annual evaluations, in a category related to their skill in rating other employees, there is no evidence that they actually evaluate other employees. Nor do they participate in the evaluation process in such a manner as to constitute effective recommendations of personnel actions, though the DON may occasionally seek their opinions of aides.

The Respondent's opposition to the Motion for Summary Judgment does not allege that the LPNs possess any of the other supervisory indicia specifically enumerated in Section 2(11). Further, the Regional Director found, and we agree, that the LPNs cannot hire, fire, lay off, or promote employees. Nor can they effectively recommend such actions, suspend, or recall employees, or grant wage increases. There is no evidence that LPNs are involved in grievance handling. They do not have access to employee personnel files and they do not participate in interviews of applicants for nurses aide positions. Nor is there any evidence that LPNs attend management meetings or are involved in the training of the aides.

For these reasons, we conclude that the record supports the Regional Director's determination that the LPNs are not supervisors. We therefore reaffirm the certification of representative issued in Case 15–RC–7807, and find the Respondent's defense to the 8(a)(5) allegations to be without merit. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Natchitoches, Louisiana, has been engaged in business as a nursing home. Annually, the Respondent, in conducting its business operations, derives gross revenues in excess of $100,000 and receives goods valued in excess of $50,000 from other enterprises located within the State of Louisiana, each of which enterprises receives those goods directly from points outside the State of Louisiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held February 17, 1994, the Union was certified on February 25, 1994, as the col-

[3] There is no contention that aides regard overtime (for being called in) as a benefit which the LPN can offer.

lective-bargaining representative of the employees in the following appropriate unit:

> All part-time and full-time licensed practical nurses employed by Evangeline Healthcare, Inc., d/b/a Evangeline of Natchitoches; excluding all other employees, and guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About March 4, 1994, the Union requested the Respondent to bargain and to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. The Union had requested: copies of the current employee handbook (if any) and employee policy manual (if any); name, address, telephone number, pay rate, regularly scheduled shift (if any), part-time/full-time status, and hours worked per week during each of the last 4 weeks for each unit employee; the same information for all laid-off employees, those on leave of absence with their projected date of return, those on disability/worker's compensation, and those on suspension with their projected date of return; descriptions and/or written copies of all disciplinary policies; a description of wage practice and policy; a description of all fringe benefits, including any seniority information related to their provision and any memoranda or written policies issued to unit employees explaining those benefits or the circumstances under which they can be used; and copies of job descriptions for the bargaining unit. This information is presumptively relevant to the Union's performance of its duties,[4] and the Respondent offers no rebuttal to the presumption. Since about March 4, 1994, the Respondent has failed and refused to bargain and to provide the information. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 4, 1994, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order it to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Evangeline of Natchitoches, Inc., Natchitoches, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 100, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Refusing to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All part-time and full-time licensed practical nurses employed by Evangeline of Natchitoches, Inc.; excluding all other employees, and guards, professional employees and supervisors as defined in the Act.

(b) Furnish the Union with the information it requested on March 4, 1994, which is necessary for, and

[4] See, e.g., *Serrot Corp.*, 310 NLRB No. 198 (Apr. 26, 1993); *Riverchase Health Care Center*, 305 NLRB No. 141 (Dec. 23, 1991), not reported in Board volumes; *Trustees of the Masonic Hall*, 261 NLRB 436 (1982); and *Verona Dyestuff Div.*, 233 NLRB 109 (1977).

relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(c) Within 14 days after service by the Region, post at its Natchitoches, Louisiana facility, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 1994.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 100, Service Employees International Union, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union with requested information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All part-time and full-time licensed practical nurses employed by us; excluding all other employees, and guards, professional employees and supervisors as defined in the Act.

WE WILL furnish the Union with the information it requested on March 4, 1994, which is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

EVANGELINE OF NATCHITOCHES, INC.